

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 25, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. SE 2010-580
	:	A.C. No. 01-02901-189700
DRUMMOND COMPANY, INC.	:	
	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 22, 2010, the Commission received from Drummond Company, Inc. (“Drummond”) a letter by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On July 1, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000189700 to Drummond. Counsel for Drummond contends that on the day management sent the email notifying him to contest the proposed penalty, he was out of the office on business in an area without mobile data service and that he received the email later that evening when he returned to a covered area. He contends that he attempted to set a reminder on his calendar via his mobile phone, but failed to properly do so. Consequently, he failed to file a contest. Counsel contends that this oversight was discovered during a recent audit of the company's files.

The Secretary opposes Drummond's request to reopen. She states that Drummond's inadequate and unreliable internal office procedures do not constitute grounds for relief under Rule 60(b). The Secretary also notes that the operator waited approximately five and a half months (from about September 24, 2009, to March 22, 2010) after being notified of its delinquency to file its request.

Drummond filed a response explaining in great detail its counsel's oversight and stating that the incident was not a case of unreliable internal office procedure, but an inadvertent error on counsel's part. It contends that it did not knowingly delay in seeking to reopen, but only discovered the omission when it recently audited its civil penalty files in the second week of March 2010 and promptly file a request to reopen.

The Secretary continues to oppose the operator's request, noting that the operator's response does not even attempt to explain why the operator waited approximately five and a half months after it was sent a delinquency notice.

Given the significant time lapse between MSHA's notification of delinquency and the operator's failure to sufficiently explain the delay, we cannot conclude that its failure to timely contest this assessment amounts to mistake or inadvertence warranting relief. Moreover, even after the Secretary's identification of Drummond's failure to seek reopening promptly after being notified of its delinquency, Drummond provided no explanation for the delay of over five months in seeking to reopen.

Based on the foregoing, we conclude that Drummond has failed to provide an adequate basis for the Commission to reopen the penalty assessment. *See Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062-63 (Dec. 2008) (denying relief because operator's excuse was insufficient); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067-68 (Dec. 2008) (same). Accordingly, we deny Drummond's request to reopen.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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